

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHIRLEY A. MAROTTA and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Covington, KY

*Docket No. 97-2156; Submitted on the Record;  
Issued September 3, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden to terminate appellant's compensation benefits as of January 7, 1996.

On October 25, 1986 appellant, a 48-year-old lead technician, injured her lower back, right knee and right arm when she slipped on a ramp adjacent to a garbage dumpster. Appellant filed a Form CA-1 claim for benefits on November 5, 1986, which the Office accepted for lumbosacral strain, right knee contusion and aggravation of degenerative disc disease at the L5-S1 level. Appellant was placed on the periodic rolls.

In a medical report dated March 23, 1994, Dr. John Schmitz, a Board-certified orthopedic surgeon and appellant's treating physician, stated that appellant could sit, stand and walk for three hours, although he advised that she might have to alternate between sitting and standing. He also stated that appellant should be able to perform simple filing work on a trial basis, but could only perform light pushing or pulling.

In a report dated June 30, 1995, Dr. Schmitz, responding to an Office inquiry, advised that it would be difficult to relate appellant's current knee condition to an injury that occurred more than eight years ago, except for her right knee contusion, which was already accepted. He further stated that "I cannot say that chond[r]omalacia of the patella would be related to her fall. This would be normal progression of a knee condition due to weakness in her leg. Her fall may have aggravated the condition."

On August 22, 1995 Dr. Schmitz submitted a report in response to an Office request for an updated medical report regarding appellant's current condition. He stated that appellant continued to have right leg pain which was a residual aggravation of the degenerative disc disease caused by the work injury. Dr. Schmitz advised that these conditions were related to the work-related injury as well as the preexisting back condition, which was aggravated by the same; he further indicated that the right knee contusion had completely resolved. In addition, Dr. Schmitz stated that appellant should avoid repetitive bending, lifting and twisting, and

advised that if she did return to work, it should be at a job whose duties were within those guidelines, and he restricted her from lifting more than 20 pounds on an infrequent basis.

By letter dated September 12, 1995, the Office informed Dr. Schmitz that it was enclosing a job description of a lead accounting technician, offered by the employing establishment, including the physical demands, and requested that he provide the Office with his opinion as to whether appellant was capable of performing the position on a full-time basis.<sup>1</sup>

In a report dated September 20, 1995, Dr. Schmitz stated that he had reviewed the job description and noted that it appeared to be an essentially sedentary type of job. He specifically stated, "I would think that she can perform these duties as long as she would be able to go from a sitting to a standing position as needed and that she would not be required to bend, lift or twist repetitively."

By telephone call dated September 28, 1995, the Office sought clarification of the job description from the employing establishment. By letter dated October 19, 1995, the employing establishment informed the Office that, after reviewing the relevant position descriptions, "the positions are sedentary work with the ability to move about at will. There is occasional lifting of boxes and binders. The boxes and binders are primarily computer output which may weigh up to 20 pounds."

In a notice of proposed termination dated November 28, 1995, the Office, based on the opinion of Dr. Schmitz, found that the weight of the medical evidence demonstrated that appellant no longer had any residuals from the October 25, 1986 employment injury. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

By decision dated January 2, 1996, the Office terminated appellant's compensation as of January 7, 1996, finding that the weight of the medical evidence established that her employment-related disability had ceased.

On January 19, 1996 appellant requested an oral hearing, which was held on July 29, 1996.<sup>2</sup> Appellant testified, and was represented by her attorney. Appellant and her attorney argued that the Office erred in finding she could perform the lead accounting technician position, because this was the same job she held at the time of her injury. The chief of the employing establishment's accounting section also appeared at the hearing, and she testified that the job description of a lead accounting technician had changed since October 1986, the date of appellant's employment injury. She stated that the job was much more sedentary in its current

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<sup>1</sup> The lead accounting technician's physical demands were described as follows: "Work is sedentary. Typically, the employee sits to do the work. However, there may be some walking, standing, bending and carrying of light items, such as bound or unbound computer reports. Finger dexterity is needed for computer work, approximately 50 percent of the time."

<sup>2</sup> The record does not contain a letter or any other form of documentation in which appellant or her attorney requested a hearing in this case. The only documentation indicating that appellant made such a request is an Office case file transfer form dated April 30, 1997, which indicates that a request for a hearing was submitted on January 19, 1996.

form and allowed for greater flexibility than in 1986, when there were greater physical demands such as repetitive bending, lifting and twisting.<sup>3</sup>

By decision dated April 30, 1997, the Office affirmed its previous decision terminating compensation, finding that the evidence appellant submitted was not sufficient to warrant modification. An Office hearing representative found that appellant was no longer disabled because she was able to perform the position she occupied on the date of injury, lead accounting technician, in accordance with its current description. The hearing representative stated that this position was currently more sedentary in nature, and that it complied with her treating physician's physical requirements.

The Board finds that the Office met its burden to terminate appellant's compensation benefits as of January 7, 1996

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup> As used in the Federal Employees' Compensation Act the term disability means incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury; that is, a physical impairment resulting in a loss of wage-earning capacity.<sup>56</sup>

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.<sup>7</sup>

In the present case, the Office found that appellant was no longer disabled based on its determination that appellant could perform the lead accounting technician position located by the employing establishment, as modified since appellant's 1986 injury, which it found to be within the physical restrictions outlined by appellant's treating physician, Dr. Schmitz. He advised in his August 22, 1995 report that appellant continued to have right leg pain stemming from the employment-related aggravation, although the right knee contusion had completely resolved, and that she also continued to suffer residuals from the work-related aggravation of her preexisting back condition. Given these conditions, Dr. Schmitz opined, appellant should be restricted from lifting more than 20 pounds on an infrequent basis and should avoid repetitive bending, lifting and twisting in the event she were to return to some form of employment. After reviewing the Office's description of the lead accounting technician job, located by the employing establishment, Dr. Schmitz opined that it appeared to be essentially sedentary, and that appellant

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<sup>3</sup> The accounting section chief explained that currently, the vast majority of the accounting positions entailed sedentary work with the ability to move about at will. She also asserted that there was not as much lifting, bending or lifting involved in the job now because it was computerized and all the equipment was on terminals.

<sup>4</sup> *Id.*

<sup>5</sup> *Ralph W. Baker*, 39 ECAB 1413 (1988).

<sup>6</sup> *See Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124.

<sup>7</sup> *Robert Dickerson*, 46 ECAB 1002 (1995).

could perform the prescribed duties so long as she would be able to move from a sitting to a standing position as needed and was not required to repetitively bend, lift or twist. The Office sought and received confirmation from the employing establishment that these requirements were met by the offered position, and then properly determined that the job was within Dr. Schmitz's restrictions.

Although appellant alleged at the hearing that she was being offered the same job she held at the time of injury, which she could no longer perform, the employing establishment rebutted with the testimony of the chief of its accounting section, who pointed out that the duties of a lead accounting technician had significantly changed since October 1986, the date of appellant's employment injury. She stated that currently, the vast majority of the accounting positions involved sedentary work with the ability to move about at will. She also asserted that there were not as many physical demands entailed by the job as there were in October 1986; *e.g.*, lifting, bending, and lifting, because it had become computerized and everything was located on terminals. Based on this evidence, therefore, the Office properly found that appellant could perform the position of lead accounting technician, as modified by the employing establishment, and that it was within the restrictions outlined by Dr. Schmitz, appellant's treating physician, whose medical opinion is unrefuted. Accordingly, the Board affirms the Office's April 30, 1997 decision affirming its January 2, 1996 termination decision.

The decision of the Office of Workers' Compensation Programs dated April 30, 1997 is hereby affirmed.

Dated, Washington, D.C.  
September 3, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member